STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2016AP308-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DAWN M. PRADO,

Defendant-Respondent-Cross-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DAVID T. FLANAGAN, III, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Statute

INTRODUCTION

Resolution of this case is simple and straightforward. There was probable cause that Dawn M. Prado crashed her van while under the influence of an intoxicant. There was no opportunity for a breath test and her blood was drawn while she was unconscious. The issue is whether the blood draw was constitutional. In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the United States Supreme Court answered that question. It established a new rule that under the circumstances present in this case, a warrant is unnecessary.

The court of appeals should have resolved this case by simply applying the *Mitchell* rule. Instead, after holding this case for more than two years for guidance, the court declined to apply the rule *Mitchell* established for cases exactly like this one, because it found the good faith exception to the exclusionary rule to be "dispositive." *State v. Prado*, 2020 WI App 42, ¶ 66, 393 Wis. 2d 526, 947 N.W.2d 182. But the good faith exception applies only when evidence is obtained unconstitutionally, and Prado's blood draw was constitutional under *Mitchell*. The court of appeals also found the unconscious driver provision in the implied consent law facially unconstitutional. But it could not properly decide that issue because of a conflict in its own opinions. And it decided the issue incorrectly. Prado did not show that application of the statute violated her constitutional rights, so she did not prove the statute unconstitutional even as applied to her.

This Court should do what the court of appeals failed to do—apply the *Mitchell* rule and conclude that the blood draw was constitutional.

ARGUMENT

I. The warrantless blood draw from Prado was justified by exigent circumstances under the new rule the United States Supreme Court established in *Mitchell v. Wisconsin*.

To decide this case, this Court need only apply the "general rule" the Supreme Court established for the "category of cases" where "the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531. When a person suspected of impaired driving is unconscious, "a warrant is not needed" to administer a blood draw. *Id.* The Court's holding applies when "police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test." *Id.* at 2539. Under those circumstances, police "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.*

The Court provided an exception to the general rule for the "unusual case" in which the defendant can show *both* that (1) "his blood would not have been drawn if police had not been seeking BAC information," *and* (2) "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* at 2539.

Prado's case falls squarely into this category of cases, and her blood draw was justified under the *Mitchell* rule.

Prado claims that *Mitchell*'s "general rule" is not a rule at all, because only four justices adopted it. (Prado's Br. 2–5.) She acknowledges that Justice Thomas supports a broader rule—when there is probable cause of drunk driving, a warrantless blood draw is justified. (Prado's Br. 3.) But Prado

argues that because Justice Thomas did not agree with what she terms the plurality opinion's "bizarre shift-the-burden-to-the-defense scheme," *Mitchell* did not establish a rule. (Prado's Br. 3.)

However, the court of appeals correctly found to the contrary in *State v. Richards*, 2020 WI App 48, 393 Wis. 2d 772, 948 N.W.2d 359. In *Richards*, the court applied the *Marks* rule for interpreting fractured Supreme Court opinions: "[w]hen a fragmented . . . Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *State v. Griep*, 2015 WI 40, ¶ 36, 361 Wis. 2d 657, 863 N.W.2d 567 (quoting *Marks v. U.S.*, 430 U.S. 188, 193 (1977)).

In *Richards*, the court of appeals recognized that "Justice Thomas did not join the four-justice plurality, but concluded that the dissipation of alcohol always presents an exigent circumstance in an OWI case." *Richards*, 393 Wis. 2d 772, ¶ 28 n.3 (citing *Mitchell*, 139 S. Ct. at 2539 (Thomas J., concurring)). "Justice Thomas advanced a broader reasoning in his concurrence than the reasoning in the plurality opinion written by Justice Alito. Accordingly, the narrowest grounds supporting the judgment in *Mitchell* were those offered by the plurality." *Id.* The court of appeals cited two cases reaching the same conclusion. *Id.* (citing *People v. Eubanks*, 160 N.E.2d 843, 861 n.6 (Ill. 2019) *Commonwealth v. Trahey*, 228 A.3d 520, 534 n.11 (Pa. 2020)).

Other cases have recognized that the plurality opinion in *Mitchell* sets forth the holding of the case without addressing *Marks*. *See e.g.*, *State v. Key*, 848 S.E.2d 315, 319 (S.C. 2020); *McGraw v. State*, 289 So.3d 836, 838 (Fla. 2019); *State v. Chavez-Majors*, 454 P.3d 600, 607 (Kan. 2019). The

State has found no case concluding that the plurality opinion's rule is *not* the holding of *Mitchell*.

Prado argues that since Justice Thomas did not embrace the "defense-burdening scheme," that part of *Mitchell* is not binding. (Prado's Br. 4) She is wrong. *Richards*, 393 Wis. 2d 772, ¶¶ 29–30. And without affording a defendant an opportunity to show that hers is the "unusual" case in which the "general rule" does not apply, what remains is the "general rule" that a warrant is not needed.

Prado argues that *Mitchell* did not announce a "new rule," but merely applied the exigent circumstances rule to the facts of that case. (Prado's Br. 6.) She claims that if this is a "new rule," the officer "was wrong to act as though it was the law at the time," and if it isn't a "new rule" the State "waived its chance to argue it." (Prado's Br. 6.)

Mitchell did not announce a new warrant exception. But it explicitly announced a new rule for application of the exigent circumstances exception. That new rule applies not just to Mitchell himself but to anyone similarly situated. "[W]hen a driver is unconscious, the general rule is that a warrant is not needed." *Mitchell*, 139 S. Ct. at 2531. "[W]e adopt a rule for an entire category of cases—those in which a motorist believed to have driven under the influence of alcohol is unconscious and thus cannot be given a breath test." *Id.* at 2534 n.2. The Court declared that "[t]his rule" applies to "cases that fall within the scope of the rule." *Id.* And the Court said it was "spelling out a general rule for the police to follow." *Id.* at 2535 n.3 (citation omitted).

The officers in this case did not rely on the new rule because the rule had not yet been established. And the State did not argue exigent circumstances in the circuit court or initially in the court of appeals because the *Mitchell* rule establishing that blood draws like Prado's are justified by

exigent circumstances did not yet exist. After the *Mitchell* decision was issued, the State filed a supplemental brief explaining why the court should decide the case by applying the *Mitchell* rule. The State did not waive the argument that the new rule applies.

Moreover, "newly declared constitutional rules must apply 'to all similar cases pending on direct review.'" *State v. Dearborn*, 2010 WI 84, ¶ 31, 327 Wis. 2d 252, 786 N.W.2d 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987)). "[A] decision of the Supreme Court 'construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.'" *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 562 (1982). Prado has yet to even be tried. The newly declared constitutional rule applies to her case.

Finally, Prado claims that if this Court applies the *Mitchell* rule, it should remand the case to the circuit court. (Prado's Br. 5.) She does not dispute that there was probable cause she drove while under the influence of an intoxicant, that she was taken to a hospital with no opportunity for a breath test, and that she was unconscious when her blood was drawn. She seeks remand only to try to show that hers is the "unusual" case in which the general rule does not apply. (Prado's Br. 5.)

Prado did not make that argument in the court of appeals. In its supplemental brief, the State explained that the court should apply the *Mitchell* rule and reverse the circuit court's order suppressing evidence. But the State acknowledged that if Prado meaningfully asserted that she could show that hers is the "unusual" case, the court should remand to give her that opportunity. Prado did not assert that she could make that showing. She said nothing about it at all.

Even now, Prado has not asserted that she can meet her burden. She says, "There's nothing in the record to suggest" that "her blood would have been otherwise drawn," and that "the officer who had just come on duty and was assigned to draw her blood would have been otherwise occupied." (Prado's Br. 5.) But that is not the standard. Prado must show that the rule does not apply because her "blood would not have been drawn if police had not been seeking BAC information," *and* "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell*, 139 S. Ct. at 2539. Prado has not even alleged that she can make those showings.

II. The court of appeals erred in finding the unconscious driver provision in Wisconsin's implied consent law unconstitutional.

The court of appeals erred in two respects. First, as the court recognized, there was "a threshold issue—whether we can even decide if the incapacitated driver provision is constitutional in light of a conflict between our prior decisions" in *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, and *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. *Prado*, 393 Wis. 2d 526 ¶¶ 33, 34. The answer to that question, as the court of appeals recognized when it certified the issue to this Court three times, was "no."

This time, the court of appeals decided that it *could* decide the issue because *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) purportedly resolved the conflict by overruling *Wintlend*. However, *Birchfield* did not address *Wintlend*, or say anything that was materially inconsistent with *Wintlend*'s interpretation and application of Wisconsin's implied consent law. *Wintlend* remains good law. And the court of appeals could not properly decide the issue.

Prado does not attempt to refute the State's argument, asserting only that, "The Court of Appeals succinctly explained in their decision in this case" why *Birchfield* overruled *Wintlend*. (Prado's Br. 11.)

Second, the court of appeals erred in actually determining that the statute is unconstitutional. A statute is unconstitutional as applied to a person only if application of the statute violated the person's constitutional rights. *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. The court of appeals did *not* find that application of the statute violated Prado's rights. Had the court applied the *Mitchell* rule, it would have found the opposite—Prado's right to be free from an unreasonable search was *not* violated because the search was lawful. The court of appeals' determination that the statute is unconstitutional, when Prado did not show that application of the statute violated her right to be free from an unlawful search, was simply wrong. *Wood*, 323 Wis. 2d 321, ¶ 13.

Prado claims that the State is arguing that "only after ruling out the litany of exceptions to the exclusionary rule can a court permissibly reach the constitutionality of the statute." (Prado's Br. 7.) And she claims that "you never get to exigent circumstances without a constitutional violation." (Prado's Br. 8.)

However, the State is arguing about exceptions to the warrant requirement, not exceptions to the exclusionary rule. And if a search is justified by exigent circumstances, there *is* no constitutional violation. *State v. Parisi*, 2016 WI 10, ¶ 3, 367 Wis. 2d 1, 875 N.W.2d 619.

Prado claims that the State is advocating for "constitutional avoidance." (Prado's Br. 7.) But the State is asking this Court to apply the *Mitchell* rule and find the blood draw constitutional under that rule. The court of appeals

avoided the constitutional issue, by declining to apply the rule under which the blood draw was justified.

Prado claims that the State "misunderstands the posture of this case," and that since the circuit court and court of appeals found the statute unconstitutional, "it's the State's job to now explain why they were wrong." (Prado's Br. 8.)

However, the circuit court did not find the statute unconstitutional—it concluded that the statute would be unconstitutional if it authorized blood draws, but that it does not authorize blood draws. (R. 33:3.) And the State has explained that the court of appeals erred in concluding that it could find the statute unconstitutional, and then in finding the statute unconstitutional. More fundamentally, it is a defendant's burden to prove a statute unconstitutional beyond a reasonable doubt, and this Court determines de novo whether a defendant satisfies that burden. *Wood*, 323 Wis. 2d 321, ¶¶ 13, 15.

Prado acknowledges that to prove that her constitutional rights were violated, she "must show that the blood draw was an unlawful search." (Prado's Br. 8.) She claims that this is "simple." (Prado's Br. 8.) But she hasn't done it or even attempted to do it.

Prado asserts that "[g]ood faith is an exception" to the warrant requirement, and that the State is conflating consent with exigent circumstances, which she likens to conflating good faith with exigent circumstances. (Prado's Br. 10.) She says that the State is claiming that since "exigent circumstances are almost present when someone is unconscious, a statute can grant consent for unconscious persons." (Prado's Br. 11.) None of that is right. And none of it matters in this case.

The issue is whether Prado's blood draw was a lawful search. It was. Whether the blood draw would have been justified by another warrant exception if it were *not* justified under *Mitchell* just doesn't matter.

Prado claims the State is arguing for "the judicial prudential doctrine of constitutional avoidance," and that it is arguing that "the Court of Appeals got it wrong by considering a constitutional issue that could have been avoided." (Prado's Br. 11.) Not at all.

The court of appeals avoided the constitutional issue—whether the blood draw was a lawful search. It did so by resorting to the good faith exception, which "becomes germane" only when a warrant exception does not apply. *Richards*, 393 Wis.2d 772, ¶ 49 n.8. And it concluded that Prado satisfied her burden of proving the statute unconstitutional, even though Prado did not prove, and the court did not find, that the blood draw was an unlawful search.

Prado seems to assert that *Marbury v. Madison*, 5 U.S. 137, 177 (1803), requires this Court to determine the constitutionality of a statute even when unnecessary to resolution of a case. (Prado's Br. 12–14.) But while only the judiciary can determine a statute's constitutionality, a defendant must prove the statute unconstitutional. To do so, a defendant must prove that application of the statute violated her constitutional rights. Prado hasn't done so, and the court of appeals erred in finding the statute unconstitutional when Prado failed to satisfy her burden.

III. Prado's blood draw was a lawful search; but even if the search had been unlawful the blood test results should not have been excluded because the officer relied in good faith on a statute that had not been found unconstitutional.

In its initial brief, the State explained that the court of appeals erred both in resorting to the good faith exception, and in applying that exception in a manner that seems to mean that a law enforcement officer cannot rely on a statute that no appellate court has found unconstitutional.

Prado attempts to refute only the State's argument that resort to the good faith exception was improper because the court of appeals did not conclude that the blood draw was an unlawful search. She claims that since the court rejected the State's argument that the blood draw was justified by statute, it determined that the blood draw was an unlawful search. (Prado's Br. 14–15.) Not so. The court did not and could not make that determination because the blood draw was justified under *Mitchell*. Resort to the good faith exception was therefore inappropriate. *Richards*, 393 Wis. 2d 772, ¶ 49 n.8.

Finally, as the State explained in its opening brief, the court of appeals improperly applied the good-faith exception in a manner that suggests police officer cannot rely in good faith on statutes that have not been held unconstitutional. Mitchell fails to address this portion of the State's argument and has therefore conceded the issue.

CONCLUSION

This Court should affirm the court of appeals' decision reversing the circuit court's order that granted Prado's motion to suppress evidence. It should hold that: (1) the blood draw from Prado was justified by exigent circumstances under the general rule the Supreme Court established in *Mitchell v.*

Wisconsin; (2) *State v. Wintlend* was not overruled by *Birchfield v. North Dakota*, and it remains good law; (3) the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. § 343.305(3)(b), is not unconstitutional facially or as applied to Prado; and (4) a law enforcement officer can rely in good faith on a statute until it is found unconstitutional in a published appellate court decision.

Dated this 3rd day of March 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-
Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2999 words.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of March 2021.

MICHAEL C. SANDERS
Assistant Attorney General